IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 00-32361

DAVID A. LUFKIN
a/k/a DAVID A. LUFKIN, ATTORNEY

Debtor

MEMORANDUM ON GENERAL REVENUE CORPORATION'S MOTION FOR RULE 2004 EXAMINATION AND ON DEBTOR'S MOTION TO QUASH

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

Two motions are presently before the court. One, entitled ?Motion for Examination of and Production of Documents Pursuant to Federal Rule of Bankruptcy Procedure 2004, and Motion for Access to Documents and Records Transferred to the Chapter 7 Trustee by Robert M. Bailey" (Motion), was filed by a creditor, General Revenue Corporation (?GRC"), on January 3, 2001. GRC seeks Rule 2004 examinations[1] of both the Debtor and the Chapter 7 Trustee, who has possession of the Debtor's records. The second is the Debtor's Motion to Quash[2] filed in response to GRC's Motion on January 9, 2001. The Motion to Quash objects, primarily on constitutional grounds, to GRC's request for a Rule 2004 examination and document production.

The parties have briefed their respective positions. The court considered oral argument on February 1, 2001.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A) (West 1993).

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[1] Rule 2004 of the Federal Rules of Bankruptcy Procedure provides in material part:

> (a) **EXAMINATION ON MOTION**. On motion of any party in interest, the court may order the examination of any entity.
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> (b) **SCOPE OF EXAMINATION**. The examination of an entity under this rule or of the debtor under § 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge.

FED. R. BANKR. P. 2004.

[2] Entitled ?Motion to Quash," this document asks for both ?an Order of Protection preventing GRC from obtaining any records and/or information [and] an Order Quashing any Order entered by the Court granting such motion and for such other Order that will protect the debtor's previously asserted constitutional rights." As the court has not entered a prior Order allowing examination by GRC and therefore has nothing to quash, the Debtor's Motion will be considered solely as a motion for a protective order.

I

This case was commenced by the filing of an Involuntary Petition under Chapter 7 against the Debtor, an attorney, on June 14, 2000. The Order for Relief was entered by default on July 13, 2000. Prior to the commencement of the involuntary case, various proceedings took place in state court. Several of those proceedings are relevant to the present controversy and have previously been summarized by the court as follows:

> On December 16, 1999, at the Debtor's request, the Tennessee Supreme Court transferred the Debtor's law license to disability inactive status, pursuant to Rule 9, § 21 of the Tennessee Supreme Court Rules. On December 17, 1999, the Knoxville Bar Association filed a Petition for Appointment of Attorney Pursuant to Supreme Court Rule 9 in the Chancery Court for Knox County, Tennessee, against the Debtor and his law firm, designated as ?Lufkin, Henley and Conner," requesting the appointment of an attorney to inventory the files of the Debtor. On December 17, 1999, Lawrence F. Giordano was appointed by the Chancery Court as attorney to take possession of and inventory the Debtor's files. On December 22, 1999, the Knoxville Bar Association filed an Amendment to Petition for Appointment of Attorney Pursuant to Supreme Court Rule 9 to add David A. Lufkin, P.C., and Lufkin, Henley & Conner, PLLC, as respondents. The Chancellor approved the amendment by an Order entered the same day. Thereafter, on January 5, 2000, citing the heavy caseload of the ?Lufkin practice entities," the Chancery Court appointed Robert M. Bailey (?the Receiver") as Receiver of the Debtor and the Law Firms. The Receiver was directed ?to take into possession the property of the law practice entities which are called David A. Lufkin, David A. Lufkin, PC, and Lufkin, Henley, and Conner, PLLC" and was assigned the responsibility of overseeing their administration and operation. Neither the Debtor nor the Law Firms, who were represented by counsel, objected to either the appointment or the powers of the Receiver.
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> On January 14, 2000, General Revenue Corporation (GRC), a creditor, moved the Chancery Court to order the Debtor and the Law Firms to produce billing ledger cards relating to GRC's accounts with the Debtor and the Law Firms. The Receiver on March 10, 2000, filed a Petition for Instructions seeking guidance from the Chancellor concerning the requests of federal and state investigative agencies for the production of the records of the Debtor and the Law Firms. In response to the Petition for Instructions, the Debtor asserted his rights under the First, Fourth, Fifth, Sixth, and Eighth Amendments of the United States

> Constitution and similar provisions of the Tennessee Constitution. The Chancery Court, in an Order entered on April 10, 2000, denied GRC's request without explanation.

In re Lufkin (Lufkin I), 255 B.R. 204, 207 (Bankr. E.D. Tenn. 2000).

In *Lufkin I,* the Trustee sought access to the business records[3] then in the possession and control of the State Court Receiver. Despite the Debtor's numerous constitutional objections, the court approved the Trustee's Rule 2004 examination of the Receiver to obtain the requested documents. *See Lufkin I,* 255 B.R. at 212-13.

On November 28, 2000, GRC filed a Motion for Extension of Time asking the court to extend the November 20, 2000 bar date for filing complaints to determine dischargeability under 11 U.S.C.A. § 523(c)(1) (West Supp. 2000). GRC explained that it had missed the filing deadline due to a miscommunication between its in-house attorneys. The court, finding that the bar date is a jurisdictional requirement not subject to defenses such as equitable tolling, denied GRC's Motion. *See In re Lufkin (Lufkin II)*, No. 00-32361, 2000 WL 1923398 (Bankr. E.D. Tenn. Dec. 19, 2000).

[3] GRC, like the Trustee in *Lufkin I*, seeks access to the business records of both the Debtor and the Debtor's law practice entities, David A. Lufkin, Attorney, David A. Lufkin, P.C., and Lufkin, Henley & Conner, P.L.L.C. These documents will be collectively referred to herein as the records of the Debtor.

GRC then filed the Motion currently before the court seeking a Rule 2004 examination of both the Debtor and the production of the records at issue in *Lufkin I.*[4] In explaining its need for the requested examination, GRC states:

> GRC is a creditor of the Debtor. As a creditor, GRC needs to investigate the financial affairs of the Debtor, including matters specifically relating to GRC, to determine assets and liabilities of the Debtor, claims held by the Debtor, and claims against the Debtor.[5]

In his Motion to Quash, the Debtor renews his constitutional objections asserting his rights under the Fourth, Fifth, and Sixth Amendments of the United States Constitution and similar provisions of the Tennessee Constitution. The Debtor also argues that there is no compelling reason for GRC to conduct an examination because: (1) GRC missed the bar date for dischargeability complaints; (2) no objection has been filed to GRC's claim against the estate; and (3) the justifications for examination offered by GRC are duties more properly performed by the Trustee.

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[4] GRC asks for the records to be produced by the Trustee instead of the Receiver, explaining **?**[r]ather than requiring the Receiver to make a new production to GRC, GRC [seeks] access to the production already made to the Trustee by the Receiver."

[5] In GRC's Memorandum in Support of Motion for 2004 Examination and Production of Documents and in Resonse [sic] to Debtor's Motion to Quash, GRC explains its business relationship to the Debtor as follows:

> GRC is a collection agency that creditors hire to collect their customers' outstanding debts. The creditors who hire GRC authorize GRC to act as their agent with respect to the collection of outstanding debts. In this regard, GRC is authorized to hire counsel to pursue their clients' debtors.
>
> From 1991 until 1999, GRC hired the Debtor and his Law Firm, a/k/a David A. Lufkin, Attorney, David A. Lufkin, P.C. and Lufkin, Henley & Conner, P.L.L.C., to collect debts for GRC, as agent for its clients. GRC's agreement with the Debtor and his Law Firm required the Debtor and his Law Firm to collect funds from debtors and hold those funds in trust for GRC. Upon receipt of such funds, the Debtor and his Law Firm were authorized to deduct contingency fees, and then account for and remit the remaining funds to GRC.

II

The court will first address the Debtor's argument that the requested production of documents to GRC would violate his Fourth Amendment privilege against unreasonable search and seizure. This protection extends only to searches and seizures conducted by governmental actors. *See United States v. Jacobsen*, 104 S. Ct. 1652, 1656 (1984). The Fourth Amendment does not apply to the actions of private parties. *See id.; Burdeau v. McDowell*, 41 S. Ct. 574, 576 (1921). A party acts under color of law only if its conduct is fairly attributable to the government. *See Lugar v. Edmondson Oil Co., Inc.*, 102 S. Ct. 2744, 2753 (1982).

Examination and review of the Debtor's records by GRC, if unassisted by governmental actors,[6] would not implicate the Fourth Amendment. *See Jacobsen*, 104 S. Ct. at 1656. Such conduct by GRC, if acting as a purely private party and not in concert with law enforcement officials or other governmental entities, would not be **?**fairly attributable to the government" so as to tint its action with color of law. *See United States v. Coleman*, 628 F.2d 961, 965 (6th Cir. 1980) (citing *Coolidge v. New Hampshire*, 91 S. Ct. 2022, 2049 (1971)) (proper test, for determining state action, is whether the private party acted as an instrument or agent of the state in conducting its search). GRC's Motion, therefore, does not implicate the Debtor's Fourth Amendment rights.

[6] The court has previously found the Trustee to be a state actor. *See Lufkin I*, 255 B.R. at 211-12. While the Trustee would technically **?**assist" GRC by producing the requested records, the production of documents is addressed by the Fifth, and not the Fourth, Amendment. The Debtor's Fifth Amendment rights in the production of the requested records are separately addressed herein.

III

The Debtor also contends that the requested examinations would violate his Sixth Amendment right to counsel. The Sixth Amendment guarantees that ?[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

As in prior documents filed with the court, the Debtor again petitions for Sixth Amendment protection without offering supporting legal analysis or authority. *See, e.g.*, *Lufkin I*, 255 B.R. at 212. The court has previously pointed out that the Sixth Amendment right to counsel attaches ?<only at or after the initiation of adversary judicial proceedings' against a criminal defendant, such as a formal charge, preliminary hearing, indictment, information or arraignment." *Id*. (quoting and citing *United States v. Gouveia*, 104 S. Ct. 2292, 2296 (1984)).

The examinations requested by GRC are not criminal proceedings. Until the initiation of such a proceeding, the Debtor ?has no constitutional right to the assistance of counsel." *Lufkin I*, 255 B.R. at 212 (quoting *Davis v. United States*, 114 S. Ct. 2350, 2354 (1994)). The court again rejects the Debtor's Sixth Amendment argument as without merit.

IV

Next, the Debtor invokes his Fifth Amendment rights relating to both production of the requested documents from the Trustee and his appearance and testimony at a Rule 2004 examination. The Fifth Amendment provides, in material part, that no person ?shall be compelled

in any criminal case to be a witness against himself." U.S. CONST. amend. V. The Fifth Amendment protects a witness against compelled disclosures that he "reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 92 S. Ct. 1653, 1656 (1972). Fifth Amendment rights may be invoked in a bankruptcy proceeding. *See McCarthy v. Arndstein*, 45 S. Ct. 16 (1924).

The court has previously addressed the Debtor's assertion of his Fifth Amendment rights relating to the production of records not under his possession or control.

> The privilege against self-incrimination is wholly personal and "cannot be utilized by or on behalf of any organization, such as a corporation." *United States v. White*, 64 S. Ct. 1248, 1251 (1944). It applies only to situations in which an individual "is compelled to make a *testimonial* communication that is incriminating." *See Fisher v. United States*, 96 S. Ct. 1569, 1579 (1976) (emphasis in original). The Fifth Amendment privilege "ceases on a transfer of the control and possession which takes place by legal proceedings and in pursuance of the rights of others, even though such transfer may bring the property into the ownership or control of one properly subject to subpoena duces tecum." *In re Fuller*, 43 S. Ct. 496, 497 (1923). The Supreme Court has further stated that the right of a debtor "to protest against the use of his books and papers relating to his business as evidence against him ceases as soon as his possession and control over them pass from him by the order directing their delivery into the hands of the receiver and into the custody of the court." *Dier v. Banton*, 43 S. Ct. 533, 534 (1923). The Fifth Amendment privilege "adheres basically to the person, not to information that may incriminate him." *Couch v. United States*, 93 S. Ct. 611, 616 (1973).
>
> In the present case, the subpoena duces tecum is addressed to the Receiver rather than the Debtor. The Receiver is the party lawfully in possession and control of the records of the Debtor and the Law Firms. *See Dier*, 43 S. Ct. 533-34. The Debtor is not being compelled to make a testimonial communication and therefore has no Fifth Amendment shield against the Receiver's production of documents. *See id.* (citing *Johnson v. United States*, 33 S. Ct. 572, 572 (1913) ("A party is privileged from producing the evidence, but not from its production.")).

Lufkin I, 255 B.R. at 210.

As in *Lufkin I*, the Debtor is not here asked to produce documents under his possession and control. Production by the Trustee does not constitute a compelled testimonial communication by the Debtor. Accordingly, the Debtor may not use the Fifth Amendment to prevent production of records lawfully outside his possession and control. *See Johnson*, 33 S. Ct. at 572.

The Debtor also may not use his Fifth Amendment right against self-incrimination as an absolute shield against personally undergoing a Rule 2004 examination. *See Donovan v. Fitzsimmons (In Re Morganroth)*, 718 F.2d 161, 167 (6th Cir. 1983) (?A blanket assertion of the privilege by a witness is not sufficient to meet the reasonable cause requirement and the privilege cannot be claimed in advance of the questions."); *see also In re Blan*, 239 B.R. 385, 392 (Bankr. W.D. Ark. 1999); *In re Connelly*, 59 B.R. 421, 434-35 (Bankr. N.D. Ill. 1986). Only criminal defendants have the absolute right not to take the witness stand. *See In re Hulon*, 92 B.R. 670, 675 (Bankr. N.D. Tex. 1988). The Fifth Amendment does not permit a civil defendant to ?avoid being sworn as a witness or being asked questions." *Id*. Instead, the witness may invoke the privilege only after listening to the questions asked and specifically invoking the privilege as to each question. *See id*.

V

Lastly, the Debtor asserts his ?Fourth, Fifth and Sixth Amendment privileges under the . . . Tennessee Constitution[]," but fails to explain how those protections differ from his federal constitutional safeguards. Nonetheless, the court will briefly address this issue.

Tennessee courts have held that certain provisions of the State Constitution offer expanded constitutional freedoms. *See, e.g.*, *State v. Marshall*, 859 S.W.2d 289, 290-91, 294-95 (Tenn. 1993) (greater right to ?free communication of thoughts and opinions"); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996) (expanded right of privacy). In addition, the Tennessee Constitution has been found to be ?somewhat more protective of private property rights" against unreasonable search and seizure. *See State v. Doelman*, 620 S.W.2d 96, 99 (Tenn. Crim. App. 1981).

This ?somewhat" expanded property right originates in the provision that ?the people shall be secure in their persons, house, papers *and possessions*, from unreasonable searches and seizures." TENN. CONST. art I, § 7 (emphasis added). However, this expanded protection is limited to property in actual possession of the owner and is thus of no help to the Debtor in the present case. *See Doelman*, 620 S.W.2d at 99 (citing *Welch v. State*, 289 S.W. 510 (1926)).

The court's research reveals no additional state constitutional provisions of benefit to the Debtor. This finding is reinforced by the Debtor's failure to brief this issue that he himself raised.

VI

Having dismissed each of the Debtor's constitutional objections, the court must still determine whether to allow GRC's requested examinations and, if so, to what extent. The purpose and scope of Rule 2004 examinations were discussed in *Lufkin I*:

> Rule 2004 of the Federal Rules of Bankruptcy Procedure provides that ?[o]n the motion of any party in interest, the court may order the examination of any entity." FED. R. BANKR. P. 2004(a). The purpose of a Rule 2004 examination is

> to determine the condition, extent, and location of the debtor's estate in order to maximize distribution to unsecured creditors. *See Longo v. McLaren (In re McLaren)*, 158 B.R. 655 (N.D. Ohio 1992). The scope of a Rule 2004 examination is extremely broad and has often been likened to a lawful ?fishing expedition." *See, e.g., Bank One, Columbus, N.A. v. Hammond (In re Hammond)*, 140 B.R. 197, 201 (S.D. Ohio 1992). Rule 2004 may be used to search for assets which have been intentionally or unintentionally concealed. *See In re Bennett Funding Group, Inc.*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996).

Lufkin I, 255 B.R. at 208.

Despite this broad scope, Rule 2004 examinations should not be overly disruptive or costly. *See id.* at 209. Additionally, courts should not approve redundant examinations or those that usurp the trustee's authority. *See In re Buick*, 174 B.R. 299, 305 (Bankr. D. Colo. 1994). Courts should be ?reticent to open the door to Rule 2004 examinations which might be identical to or duplicative of existing discovery needs and activities of other interested parties, such as here with the Trustee." *Id.* ?[W]ell-defined and carefully tailored protective orders" may be used to ?ensure that interested parties do not exceed the appropriate boundaries of Rule 2004 examinations." *Id.* at 305-06. In determining the allowance and scope of a Rule 2004 examination, the court should weigh the legitimate interests of each party. *See In re Schultz*, 134 B.R. 604, 605 (Bankr. E.D. Mich. 1991).

GRC filed its claim on December 18, 2000, as a nonpriority, unsecured claim in the amount of ?$65,008.00+." The claim is not supported by any documents. Rather, GRC has appended to its claim the following statement:

> The documents supporting this claim are in the possession of the debtor because they were generated by the debtor during his representation of GRC. Others were sent to the debtor by GRC in the course of the debtor's representation of GRC.

> The debtor has refused to release these documents to GRC, or to make them available to GRC.
>
> Additional documents are in GRC's possession, but are too voluminous to produce because they comprise hundreds of files related to collection claims referred to the debtor between 1991 and 1999.

GRC is entitled to determine the amount of its claim and the court will allow the Rule 2004 examination of the Debtor, at a time and place to be hereinafter designated by court order,[7] and the examination of the Trustee for the exclusive purpose of obtaining the production of documents necessary to that determination. To that end, the court will grant GRC's Motion, but will limit the scope of the examination to matters and documents relating solely to GRC's claim against the Debtor.[8] This will afford the Debtor the protection requested in his Motion to Quash.

An appropriate order will be entered.

FILED: February 7, 2001

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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[7] Rule 2004(d) provides:

> **(d) TIME AND PLACE OF EXAMINATION OF DEBTOR.** The court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates, whether within or without the district wherein the case is pending.

FED. R. BANKR. P. 2004(d). At such time as GRC desires to examine the Debtor, it shall tender an order consistent with this Memorandum directing the Debtor's appearance at a designated time and place.

[8] At oral argument, GRC's counsel stated that his client seeks ledger cards, **?**collection partner printouts," the complete file for each GRC account and any other record in the Trustee's possession relating to the GRC collection accounts transferred to the Debtor.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 00-32361

DAVID A. LUFKIN
a/k/a DAVID A. LUFKIN, ATTORNEY

Debtor

O R D E R

For the reasons stated in the Memorandum on General Revenue Corporation's Motion for Rule 2004 Examination and on Debtor's Motion to Quash filed this date, the court directs the following:

1. General Revenue Corporation's Motion for Examination of and Production of Documents Pursuant to Federal Rule of Bankruptcy Procedure 2004, and Motion for Access to Documents and Records Transferred to the Chapter 7 Trustee by Robert M. Bailey, filed by General Revenue Corporation on January 3, 2001, is, subject to the conditions set forth herein, GRANTED.

2. The Motion to Quash filed by the Debtor on January 9, 2001, which the court deems a motion for protective order, is GRANTED to the extent set forth herein.

3. General Revenue Corporation is authorized to examine the Debtor pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure. The examination shall be limited exclusively to those accounts General Revenue Corporation turned over to David A. Lufkin, Attorney, David A. Lufkin, PC, and/or Lufkin, Henley & Conner, PLLC, for collection and shall relate to the contents of all collection files, ledger cards and **?**collection partner printouts." The examination will take place upon future order of the court designating the time and place of the examination.

4. General Revenue Corporation is authorized to examine the Chapter 7 Trustee, William T. Hendon, pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure, and to compel, by a subpoena duces tecum, the Trustee's production of documents consisting exclusively of the accounts General Revenue Corporation turned over to David A. Lufkin, Attorney, David A. Lufkin, PC, and/or Lufkin, Henley & Conner, PLLC, for collection, including the contents of all files, ledger cards and **?**collection partner printouts." General Revenue Corporation is authorized to examine and copy, at its expense, all such documents produced by the Trustee pursuant to this Order.

SO ORDERED.

ENTER: February 7, 2001

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE